"CONSENT" IN THE NEW YORK MECHANIC'S LIEN LAW.[1]

I.

Section 3 of this Act provides as follows:

"A contractor, sub-contractor, laborer or material man, who performs labor or furnishes materials for the improvement of real property *with the consent* or at the request *of the owner* thereof, or his agent, contractor or sub-contractor, shall have a lien for the principal and interest of the value or the agreed price of such labor or materials upon the real property improved or to be improved and upon such improvement from the time of filing a notice of such lien as prescribed in this Article."

The Act of 1885 (Chap. 342), which has been replaced by the Act of 1897, provided for a mechanic's lien where the improvement was made "with the consent of the owner" (Sec. 1).

The judicial construction of the term "consent" in these Acts has presented the chief difficulty in this branch of the law. Able judges have expressed views of the meaning of this word which are diametrically opposed to each other. Mr. Justice Patterson, writing for the Appellate Division in the First Department in 1899, said:[2]

"The true test is * * * Has the owner given his consent in such a manner as to bind him within recognized principles of equity."

Mr. Justice Williams, for the Appellate Division in the Fourth Department, in 1901, said:[3]

"The consent * * * is a statutory one which is in no sense to be determined upon principles of equity."

Both judges were engaged in expounding and applying the rule of the Court of Appeals on the point; both decisions were reversed in that Court, the former in its entirety,[4] the latter in its larger part.[5]

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[1] Session Laws 1897, Chap. 418, Art. 1.

[2] National Wall Paper Co. *v.* Sire, 37 App. Div. 405, 408.

[3] Rice *v.* Culver, 57 App. Div. 552, 557.

[4] National Wall Paper Co. *v.* Sire, (1900) 163 N. Y. 122.

[5] Rice *v.* Culver, (1902) 172 N. Y. 60.

While it is obvious for several reasons that the Court of Appeals has not yet settled upon a construction of this term which could be regarded as final, yet it was assumed that in the process of definition by exclusion it had determined the boundaries of consent on one side, for it had said:[1]

"Consent is not a vacant or neutral attitude * * * It is affirmative in its nature."——

and it had held, therefore, in several cases[2] that *mere knowledge of the improvement as it proceeded and failure to object* did not constitute consent. But even that part of the definition is now doubted, for, in a case in that Court, just reported, where it appeared that an improvement had been made by direction of a prospective tenant pending negotiations for a lease which was subsequently executed, the Court says,[3] in the prevailing opinion:

"A Trial Court might have found that the appellant [lessor] being in control and possession of his lands *knowingly suffered* beneficial improvements to be made upon it." ——

and it held that to be consent.

Without multiplying instances it must be clear that the difficulty with the construction of the term is great. To the writer of this article it seems that a large part of the difficulty has arisen from fixing the gaze of court and counsel too closely upon the word "consent" in the statutes and thus overlooking the entire phrase "consent of the *owner*." If it is possible to determine readily which one of the various owners mentioned in the statute is the owner whose consent is contemplated, it may be found that the construction of the term "consent" is then clear.

The meaning of the Act is to be ascertained, not from a single expression, but from all its provisions.[4] The attempt will therefore be made to determine from other provisions of the statute touching on that point which one of

[1] DeKlyn *v.* Gould, (1901) 165 N. Y. 282.

[2] Cowen *v.* Paddock, (1893) 137 N. Y. 188; Spruck *v.* McRoberts, (1893) 139 N. Y. 193 *semble*; Vosseller *v.* Slater, (1900) 163 N. Y. 564 DeKlyn *v.* Gould, (1901) 165 N. Y. 282.

[3] Rice *v.* Culver, (1902) 173 N. Y. 60, 66.

[4] Kelly *v.* Bloomingdale, (1893) 139 N. Y. 343; Clark *v.* Devoe, (1891) 124 N. Y. 120; Fox *v.* International Co., (1899) 41 App. Div. 140.

the various owners whom it mentions is the owner whose consent is required.

In pursuing this inquiry it will promote clearness of thought to consider the statute in connection with a concrete case. The courts always do so of necessity. The true meaning of a statute, or for that matter of any writing, appears only when translated into the terms of a case.

One of the commonest cases is that where an owner in fee leases to a tenant who covenants to improve. As applied to this case the question will be: Is it the owner of the reversion, or is it the owner of the term whose consent is required by the statute?

Undoubtedly there is an impression afloat in the minds of New York lawyers that the estates of both owners are subject to the lien in the concrete case stated above. And this impression finds support in one decision[1] of the Appellate Division in the Second Department, though the point has not been expressly decided in the Court of Appeals. But it must be borne in mind that, independently of statute, there can be no such lien,[2] and that, if it is desirable to fasten it upon the reversion, "it is better," as the Court of Appeals said[3] of a former lien law, "to leave any amelioration or improvement of the law which may be needed to the Legislature than by a forced and unnatural construction of the language used in this Act to seek for a legislative purpose not apparently expressed."

II.

Section 1 of the statute, which purports to define the "owner," is apparently capable of three constructions. Without doing much violence to the language, it may mean, in the concrete case stated above, (1) the reversioner, (2) the tenant, or (3) both. This obviously gives little aid in determining the true construction, and so it is necessary to look further into the statute.

Section 8 of the statute provides as follows:

"A statement of the terms of a contract pursuant to which an improvement of real property is made, and of the amount due or to become due thereon, shall be furnished upon demand by the owner or his duly authorized agent to a sub-contractor, laborer or material man."

[1] Hilton *v.* Murray, (1900) 47 App. Div. 289.
[2] Tubridy *v.* Wright, (1895) 144 N. Y. 519.
[3] Per Earl, J., in Cornell *v.* Barney, (1884) 94 N. Y. 394, 401.

And this section further provides a penalty for refusal or failure to comply with the demand.

It seems obvious that such a statement could, in the ordinary case, be furnished only by the person who is himself a party to the contract for the improvement, or, in the concrete case stated above, by the tenant only and not by the reversioner. It is apparent that in many, if not most, cases the reversioner would have no means of ascertaining the terms of the contract, and it must be a rare case in which he could ascertain "the amount due or to become due thereon." If the term owner is construed as meaning the tenant only, the provision is clear and equitable.

Consider, now, the consequences of any other construction. If "owner" in this case means the reversioner, a penalty is imposed for the failure to perform an act which, in the nature of things, will be in most cases impossible to perform. This would be a manifest injustice, and a construction of a statute which works injustice is to be avoided.[1] If, again, it means both the tenant and the reversioner, and the demand is made on both and rejected, by the tenant wilfully, and by the reversioner because of the impossibility of performance, the reversioner is still subject to the penalty because of the act of his tenant, whose conduct is beyond his control. Lord Coke said: "*Lex neminem cogit ad impossibilia peragenda*"; but here, if the plain construction of this section is abandoned and a "forced and unnatural" one adopted, the law punishes the reversioner for his failure to accomplish the impossible.

There is no reported case in which the Court has considered this section of the Act, but it would seem to be an affront to intelligence to assume that any court can construe the word "owner" here as meaning any owner except the owner who contracts for the work; in other words, the owner of the term in the concrete case under consideration, and not the owner of the reversion.

Section 15 of the Act invalidates certain assignments of contract for an improvement of real estate or of the moneys due thereunder, and orders "drawn by the contractor or

[1] Polhemus *v.* Fitchburg R. R. Co., (1890) 123 N. Y. 502, 509; Hayden *v.* Pierce, (1895) 144 N. Y. 512, 516; O'Grady *v.* N. Y. Mut. &c. Co., (1897) 16 App. Div. 567, 571.

sub-contractor upon the owner of such real property for the payment of such money." It must be plain, under this section of the Act, that the word "owner" means the owner who has contracted for the improvement, for it cannot be supposed that the mechanic will draw an order for payment of the contract price on any other owner who is a stranger to the contract. No person but the owner who contracts can have in his hands a fund applicable to the contract, and no order not drawn on that fund can operate as an assignment, or have any legal effect whatsoever merely as an order. Unless so drawn, it would be a legal nullity if the statute did not exist, and it is absurd to suppose that the statute is directed to destroying that which is already without legal force. But besides this, the statute contemplates the validating of such an order by the act of the mechanic or his assignee in filing certain papers. If this means that the order is to be validated as against the owner of the reversion, then the statute takes his property without due process of law. If, on the other hand, the owner is the owner of the term who enters into the contract for repairs, the statute is valid and its purpose equitable, and "owner" in this section, as in Section 8, means, in the concrete case under consideration, not the owner of the reversion, but the owner of the term.

In Section 11, affording protection to an "owner" who pays a contractor in good faith, and before notice of a lien filed, and in Section 14, affording protection to an "owner" who, without notice of an assignment of lien, pays the lienor, a like construction must be adopted for like reasons.

III.

Now consider a further consequence of holding that the term "owner" in the statute, as applied to the concrete case under consideration means, not the owner of the term, but the owner of the reversion.

The manifest purpose of the statute is to afford the utmost protection to the day-laborer. He is entitled to priority, without reference to the time when he files his lien (Section 12), and the Legislature, in its special care for the day-laborer, put this provision into the act a second time in

1898 (Section 24), perhaps because it doubted if its language in 1897 was strong enough. How, then, does the day-laborer fare under this construction?

Returning for a moment to Section 3 of the Act, quoted at the beginning of this article, it will be seen that the laborer has a lien under this Act, and he has no lien otherwise, if he performs work in improving real property "with the consent or at the request of the owner thereof, *his* agent, contractor, or sub-contractor." But in the case we are considering the owner of the reversion has no contractor nor sub-contractor. The only owner who has a contractor or sub-contractor is the tenant, owner of the term.

Furthermore, the consent and request mentioned in this Act is plainly something real and not fictitious. If the mere general consent of the owner to the performance of the work was sufficient to give a right of lien to the laborer, the contractor and sub-contractor would have been omitted from the category of persons whose consent is necessary. Force must be given to all the words in the Act, and the only way in which to give force to the words "contractor or sub-contractor" in this Section is to hold that they are inserted in this category because actual consent or actual request running immediately to the mechanic is necessary.

It might, perhaps, be held that if the owner of the reversion is the owner whose consent is material, his general consent may be deemed to run to the tenant's contractor; but the contractor's consent can give the laborer no right of lien against the estate of the owner of the reversion, for the contractor is not "*his*" contractor, but the tenant's contractor.

This construction then cuts off the laborer, who appears to be the object of special solicitude on the part of the Legislature, while caring for the contractor, whose rights were to be postponed to those of his employees. It cannot be supposed that any such result was intended, and no court has yet so held. If, on the contrary, the word "owner" means, in the case under consideration, the owner of the term, then the contractor is "his" contractor, and the smaller persons, sub-contractors, material-men and laborers, have their lien against the term; the contractor is not preferred to the laborer, but the laborer to the contractor, as the law

intended; and a construction leading to absurdity and inequity is avoided.

These various considerations lead to the conclusion that the word "owner," in the concrete case under consideration, must be construed as meaning owner of the term, and not owner of the reversion.

IV.

In order to make sure that this interpretation is right, it must be tested as applied to one more case, and for that purpose it will be convenient to take the case of the owner in fee who leases for years and covenants by the lease to make repairs during the term.

The lessor in this case can comply with Section 8 of the Act, for he makes the contract for repairs and pays for them; he therefore can supply the "terms of the contract" and a statement of "the amount due or to become due thereon." He is now plainly the "owner" aimed at in Sections 11 and 14 of the Act, for he is the person who pays for the work and needs the protection of the proviso of the statute in case of payment before notice of lien, and in case of payment to the lienor before notice of assignment. He is the person contemplated by Section 15, for it is upon him that orders for payment would be drawn by a contractor. And for all these reasons he is the only "owner" to whom the Act is applicable in this case. Section 3 of the Act now fits him and does not fit the lessee; exactly as, in the case first put, it fits the lessee and does not fit the reversioner.

The consideration of these two classes of cases leads naturally to the conclusion that the respect in which they differ supplies the basis for the true construction of this Act. This difference between them is merely that in the first case the lessee made the contract for the improvement, and in the second the lessor. In the first case the improvement was made "with the consent or at the request" of the one; in the second, of the other.

The "apparent carelessness which has marked much of the legislation on this subject" has been judicially recognized,[1] and the present Act is no exception in this respect.

[1]Per Dwight P. J. in Matter of Dean (1894) 83 Hun, 413, 415.

But in Sections 8 and 15 of the Act the construction of the term owner is unequivocal and substantially so in Sections 11 and 14, and it follows that the same word used elsewhere in the Act must have the same meaning wherever it occurs, so far as that is practicable,[1] while, if this construction is applied to the whole Act, all its provisions are clear. "Consent or request of the owner," then, means "express or implied contract with the owner," or, more shortly, "contract with the owner"—an apt conclusion, and one which gives force to every word of the Act and does violence to none.

That this conclusion indicates that the learned revisors and the Legislature failed to express themselves *secundum artem* in the most concise language is of no moment. Few legislative acts can stand that test. The revisors doubtless knew that there are two kinds of contracts, one based on *consent*, called express contracts, and another, called implied contracts, of which the common type is presented by a mere *request* to perform. Instead of using the terms express or implied contract, they have recited the distinguishing features of the two kinds of contract, thinking, perhaps, thereby to render their meaning clearer to common understandings and leaving the legal meaning to the courts.

One thing more supports this construction. If the term "request" means implied contract, as was held[2] of the similar word "direction" in construing a former act, and the word "consent" does not mean express contract, but something different, then the case of work done under an express contract has been omitted from the Act, and it affords no relief in the largest class of cases to which it has been assumed that it applies. But the courts have always held the other way, and the provision enabling the subcontractor to demand of the owner a "statement of the the terms of the contract" supports that holding, and leads to the conclusion that the "terms of the contract" and "consent" are used in the statute interchangeably, meaning express contract.

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[1] Browne *v.* Paterson (1899) 36 App. Div. 167, 173.

[2] Knapp *v.* Brown, (1871) 45 N. Y. 207, 211; Muldoon *v.* Pitt (1873) 54 N. Y. 269, 272.

V.

The questions propounded in this article are thus answered. In the phrase "with the consent or at the request of the owner," the term "owner" means the owner, of whatever estate, who actually contracts for the improvement, and the words consent and request mean contract, express or implied, or contract merely.

None of the considerations leading to these conclusions is adverted to in any reported decision under the Act of 1897. There is but one case where the Court in its opinion deals at all with the question of the meaning of the term owner, and in that case the Court held that it meant two different things, an instance of unusual interpretation, for which no precedent was cited and perhaps none exists. In one decision only, under the Act of 1885, did the Court consider the meaning of the term owner, and it there said[1] merely that a vendor who had let a vendee into possession under an executory contract of sale was owner by the express terms of the statute, and therefore his estate was subject to a lien for improvements made by the vendee. It is of interest to note that the same Court, construing a similar provision in an earlier statute, reached the opposite conclusion and determined that there could be no lien against the interest of an owner who had not contracted for the improvement.[2]

If the interpretation of the statute suggested in this article is required by the canons of construction, affords the only clear and certain rule of decision and the only relief to day-laborers in an important class of cases, it can be no objection that it deprives contractors of a part of the security which it has been assumed they derive from it. Their position is no worse than it was under the New York County Lien Law prior to the Act of 1885, and if further relief is desirable in their interest, they should apply, not to the body which interprets laws, but to the body which makes them.

HENRY W. HARDON.

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[1] Schmalz *v.* Mead, (1891) 125, N. Y. 188, 192.

[2] Knapp *v.* Brown (1871) 45 N. Y. 207, 212.